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May 19, 2008

Mr. Devin M. Wells
Assistant General Counsel
Tennessee Department of Environment and Conservation
401 Church St.
20th Floor, L&C Tower
Nashville, TN 37243

**Re: Commissioner's Order, Case No. WPC07-0186
In the Matter of: Tennessee Department of Transportation and
Dement Construction Company**

Dear Mr. Wells,

Please find enclosed Respondent Tennessee Department of Transportation's response to and petition for review of the above referenced Commissioner's Order. Please note that this response and petition for review also constitutes Respondent TDOT's appeal of the Natural Resources Damage Assessment that is part of the Order.

Sincerely,

Houston Howell
Assistant General Counsel

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Encl.

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVAITON
TENNESSEE WATER QUALITY CONTROL BOARD**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
TENNESSEE DEPARTMENT OF)	
TRANSPORTATION and)	
DEMENT CONSTRUCTION)	
COMPANY)	
)	
RESPONDENTS)	CASE NO. 07-0186

**Response to Commissioner's Order, Appeal of Natural Resource Damage
Assessment and Petition for Review**

Comes the Respondent, the Tennessee Department of Transportation (TDOT), by and through counsel, and files this Response and Petition for Review of Commissioner's Order No. WPC07-0186 and Appeal of the Natural Resource Damage Assessment (NRDA), in the amount of \$312,659.40, contained in Paragraph XVIII(3) (at p.11 of the Order, sic on paragraph numbering) of that Order. The Respondent answers the Commissioner's allegations as follows:

Paragraph I. Admitted.

Paragraph II. Admitted.

Paragraph III. Admitted.

Paragraph IV. Admitted.

Paragraph V. Respondent concedes that the Commissioner is empowered under TENN. CODE ANN. § 69-3-116 to assess damages to the state resulting from any person's pollution or violation. Respondent contends, however, that TENN. COMP. R. & REGS. 1200-4-1-.03(1)(c)(3) strictly limits the Commissioner's recovery to the damages set out in TENN. CODE ANN § 69-3-116(a), which are damages "resulting from any person's pollution, violation, failure, or neglect in complying with any rules, regulations, or standards of water quality...or permits or orders...." [Emphasis added] Respondent contends, therefore, that the Commissioner may not assess damages under TENN. CODE ANN. § 69-3-116 without proof that the party being required to pay has caused a condition of pollution or violated a rule, regulation, standard of water quality, permit, or order, and that even in the event that such proof is available, the Commissioner may only recover damages proven to result from such pollution or violation. Respondent further contends that the definitions contained in this paragraph of the terms "Natural Resources" and "Natural Resource Damages" are not in any rule or statute and that the Commissioner's use of such definitions in the exercise of his power under TENN. CODE ANN. § 69-3-116 constitutes the application of an improperly adopted rule and is therefore invalid according to TENN. CODE ANN. § 4-5-216.

Paragraph VI. Respondent admits that it is a "person" as defined at TENN. CODE ANN. § 69-3-103(20), but denies the violations as set out in the Order and demands strict proof of all alleged violations.

Paragraph VII. Admitted.

Paragraph VIII. Respondent admits that Choate Creek and North Fork Choate Creek are "waters of the state" and denies that North Fork Choate Creek is listed as "Outstanding Tennessee Waters" because no such designation exists. Respondent admits that Choate Creek, North Fork Choate Creek, and its unnamed tributaries have been classified for the uses stated in this paragraph, but contends that such classification is invalid as it was made without consideration of the factors laid out in TENN. CODE ANN. § 69-3-105 (2), and therefore in excess of the authority the general assembly has granted to the Water Quality Control Board. Respondent further contends that any action of the Commissioner based on such classifications is likewise invalid.

Paragraph IX. Admitted.

Paragraph X. Respondent admits that the amount of total rainfall recorded on the site for June 19, 2007 was 2.38 inches and contends based on information and belief that such rainfall occurred over forty-five minutes, that such an amount of rain over such a short period of time is classified according to National Oceanic and Atmospheric Administration data as a 25-year event, and that the resulting stormwater runoff was greater in volume and velocity than that required to be retained onsite by the minimum design requirement to provide EPSC measures necessary to retain sediment onsite during a 2-year, 24 hour storm. Respondent contends, therefore, that any release of sediment into the waters of the state resulting from this rain event was an unavoidable accident.

Paragraph XI. Admitted.

Paragraph XII. Respondent admits the sediment releases as described in this paragraph. Respondent states that its consultants made timely inspections of onsite EPSC measures and filed reports of the findings of such inspections with TDEC personnel. Respondent further states that it reasonably relied on the inspection reports of its consultants. Respondent denies any lack of oversight by TDOT personnel and demands strict proof of any allegation to the contrary.

Paragraph XIII. Respondent admits that the EPSC measures at Outfall #18 deviated from the SWPPP insofar as the SWPPP called for a rock silt screen and the measure installed was a riprap check dam, but denies that the SWPPP called for more check dams that were not installed and contends that the admitted deviation from the SWPPP was irrelevant to the sediment release from Outfall #18 because the June 19, 2007 rain event would have overwhelmed the SWPPP mandated rock silt screen just as it did the installed riprap check dam.

Paragraph XIV. Respondent admits the allegations of this paragraph as to CEC personnel having performed a stream assessment on the dates specified and as to the contents of the report summarizing its findings. Respondent contends, however, that CEC determined and assigned the classifications (minimal, minor, moderate, and severe) to the noted sedimentation impacts according to highly subjective methodology supplied by TDEC and included those classifications in the report at the direction of TDEC personnel.

Respondent further contends that such classifications have no demonstrated scientific merit, are not related in any way to any efforts to remediate impacts to the affected waters, and are arbitrary on their face and as applied.

Paragraph XV. Admitted.

Paragraph XVI. Admitted.

Paragraph XVII. Respondent admits that on July 16, 2007, the Tennessee Department of Environment and Conservation issued to Respondent a Notice of Violation. Respondent contends that it received the NOV on July 24, 2007 and responded to it with the required information on July 30, 2007. Respondent further contends that it completed and submitted to TDEC a Stream Assessment and Restoration Plan on June 28, 2007, well in advance of any demand for one.

Paragraph XVIII. Respondent denies that any discharge of sediment for which it may be responsible has injured the natural resources of the State of Tennessee or the services that they provide and demands strict proof as to the nature and extent of any such alleged injury and as to the diminished value of any services provided by the natural resources alleged to have been injured.

Paragraph XIX. Respondent denies the described violations and demands strict proof thereof.

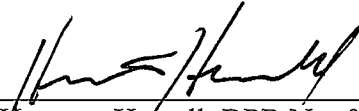
Paragraph XXI (sic). Respondent denies the described violations and demands strict proof thereof.

Paragraph XVIII (sic). Having denied the violations alleged in the preceding paragraphs, Respondent now denies its liability for the sums demanded in this paragraph. Respondent further contends that if the Natural Resources Damage Assessment that Respondent is ordered to pay in subparagraph 3 of this paragraph is intended as an assessment by the Commissioner to recover for damages to the state, as authorized by TENN. CODE ANN. § 69-3-116, it is invalid because it is not itemized as required by TENN. COMP. R. & REGS 1200-4-1-3 (1)(c)(3).

Petition for Review

Now, having fully responded to the Commissioner's Order and Assessment, Respondent requests a hearing on the Petition for Review and Appeal before the Tennessee Water Quality Control Board pursuant to TENN. CODE ANN. § 69-3-109(a)(3), § 69-3-110, and § 69-3-116(b). This Response, Petition and Appeal being timely filed, the Order and NRDA are not final and, therefore, the actions, penalties and deadlines they prescribe are not enforceable pending a hearing by the Board.

Respectfully submitted this 19th day of May 2008.



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